



**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**[RTID 0648-XA169]**

**Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Renewal of U.S. Navy Target and Missile Launch Activities on San Nicolas Island**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; request for comments on proposed Renewal incidental harassment authorization.

**SUMMARY:** NMFS received a request from the U.S. Navy (Navy) for the Renewal of their currently active incidental harassment authorization (IHA) to take marine mammals incidental to target and missile launch activities on San Nicolas Island (SNI). These activities are identical to those covered in the current authorization. Pursuant to the Marine Mammal Protection Act, prior to issuing the currently active IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The Renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed Renewal not previously provided during the initial 30-day comment period. The Navy's activities are considered military readiness activities pursuant to the Marine Mammal Protection Act (MMPA), as amended by the National Defense Authorization Act for Fiscal Year 2004 (NDAA).

**DATES:** Comments and information must be received no later than **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.DeJoseph@noaa.gov*.

*Instructions:* NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. All comments received are a part of the public record and will generally be posted online at *<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>* without change. All personal identifying information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Bonnie DeJoseph, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application, Renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: *<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>*. In case of problems accessing these documents, please call the contact listed above.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

The Marine Mammal Protection Act (MMPA) prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as “mitigation measures”). Monitoring and reporting of such takings are also required. The meaning of key terms such as “take,” “harassment,” and “negligible impact” can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency’s regulations at 50 CFR 216.103.

NMFS’ regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed one year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a Renewal for this

activity, and requested public comment on a potential Renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical, activities as described in the **Description of the Specified Activities and Anticipated Impacts** section of the notice is planned or (2) the activities as described in the **Description of the Specified Activities and Anticipated Impacts** section of the notice would not be completed by the time the IHA expires and a Renewal would allow for completion of the activities beyond that described in the Dates and Duration section of the notice, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that the Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA).

- The request for renewal must include the following:

- (1) An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).

- (2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more

than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed Renewal. A description of the Renewal process may be found on our website at:

[www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals](http://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals). Any comments received on the potential Renewal, along with relevant comments on the initial IHA, have been considered in the development of this proposed IHA Renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested Renewal, and agency responses will be summarized in the final notice of our decision.

The NDAA (Pub. L. 108–136) removed the “small numbers” and “specified geographical region” limitations indicated above and amended the definition of “harassment” as it applies to a “military readiness activity.” The activity for which incidental take of marine mammals is being requested addressed here qualifies as a military readiness activity.

### **National Environmental Policy Act**

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action (*i.e.*, the issuance of an IHA) with respect to potential impacts on the human environment. This action is consistent with categories of activities

identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the IHA qualifies to be categorically excluded from further NEPA review.

### **History of Request**

On June 19, 2019, NMFS issued an IHA to the Navy to take marine mammals incidental to U.S. Navy Target and Missile Launch Activities on San Nicolas Island, California (84 FR 28462; June 19, 2019), effective from June 12, 2019 through June 11, 2020. On April 14, 2020, NMFS received an application for the Renewal of that initial IHA. As described in the application for Renewal IHA, the activities for which incidental take is requested are identical. As required, the applicant also provided a preliminary monitoring report (available at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-target-and-missile-launch-activities-san-nicolas-0>) which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted.

### **Description of the Specified Activities and Anticipated Impacts**

The Navy proposes to continue a target and missile launch program from two launch sites on SNL. Missiles vary from tactical and developmental weapons to target missiles used to test defensive strategies and other weapons systems. Some launch events involve

a single missile, while others involve the launch of multiple missiles in quick succession. The Navy proposes to conduct a maximum of 40 missile launch events from SNI, but the total may be less than 40 depending on operational requirements. No more than 25 launches have occurred in any single year since 2001 (Table 1).

**Table 1 -- The Total Number of Launches That Have Occurred Since 2001 at SNI**

<b>Time Period</b>	<b>Number of Launches</b>
August 2001 to October 2005	69
February 2006 to December 2009	11
January 2010 to December 2014	36
December 2015 to November 2018	30
June 2019 to March 2020	12

Launch timing will be determined by operational, meteorological, and logistical factors. Up to 10 of the 40 launches may occur at night; night launches are also dependent on operational requirements and will only be conducted when required by test objectives. These proposed activities are identical to those in the Initial IHA and are described in detail in the Initial Proposed IHA (84 FR 18809; May 2, 2019).

Anticipated impacts, which would consist of Level B harassment of marine mammals, would also be identical to those analyzed and authorized in the Initial IHA (84 FR 28462; June 19, 2019). The Navy's request is for take of California sea lions (*Zalophus californianus*), harbor seals (*Phoca vitulina*), and northern elephant seals (*Mirounga angustirostris*) by Level B harassment only. All flights over SNI would be subsonic; therefore, there would be no sonic booms that could affect pinnipeds hauled out

at sites on SNI. Neither Navy nor NMFS expects serious injury or mortality to result from this activity.

#### *Detailed Description of the Activity*

A detailed description of the target and missile launch activities for which take is proposed here may be found in the Notices of the Proposed and Final IHAs for the initial authorization. The location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notices. The proposed Renewal would be effective for a period of one year from the date of issuance.

#### *Description of Marine Mammals*

A description of the marine mammals in the area of the activities for which authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the Notices of the Proposed and Final IHAs for the initial authorization. NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified Activities section contained in the supporting documents for the initial IHA.

#### *Potential Effects on Marine Mammals and their Habitat*

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which take is proposed here may be found in the Notices of the Proposed IHA for the initial authorization. NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information

on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

#### *Estimated Take*

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the Notices of the Proposed and Final IHAs for the initial authorization. Specifically, the source levels, days of operation, and marine mammal occurrence data applicable to this authorization remain unchanged from the previously issued IHA. Further, the 2019 monitoring data received from the Navy suggests that the actual number of marine mammals taken during the Navy launches remained well under the number authorized in the initial IHA and proposed in this Renewal IHA. The stocks taken, methods of take, and types of take remain unchanged from the previously issued IHA, as do the number of takes, which are indicated below in Table 2.

**Table 2 -- Proposed Level B Harassment Take for Pinnipeds on SNI**

<b>Species</b>	<b>Authorized Level B harassment</b>	<b>Percent of Stock Abundance taken by Level B harassment (assuming each instance is different individual)</b>
California sea lion	11,000	257,606 (4.27 percent)
Harbor seal	480	30,968 (less than 2 percent)
Northern elephant seal	40	179,000 (less than 1 percent)

#### *Description of Proposed Mitigation, Monitoring and Reporting Measures*

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the **Federal Register**

Notice announcing the issuance of the initial IHA, and the discussion of the least practicable adverse impact included in that document remains accurate. The following measures are proposed for this renewal:

#### Proposed Mitigation

##### *Operation Restrictions*

Personnel must not enter pinniped haulouts. Personnel may be adjacent to pinniped haulouts prior to and following a launch for monitoring purposes. All aircraft and helicopter flight paths must maintain a minimum distance of 305 meters (m) from recognized seal haulouts and rookeries, to the maximum extent practicable. Missiles must not cross over pinniped haulouts at elevations less than 305 m (1,000 ft).

If a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized takes are met, the Navy must consult with NMFS before the next launch event.

The Navy must review the launch procedure and monitoring methods, in cooperation with NMFS, if any incidents of injury or mortality of a pinniped are discovered during post-launch surveys, or if surveys indicate possible effects to the distribution, size, or productivity of the affected pinniped populations as a result of the specified activities. If necessary, appropriate changes must be made through modification to this Authorization prior to conducting the next launch of the same vehicle.

##### *Timing Restrictions*

The Navy may not conduct more than 10 launch events at night. Launches must not occur during February through April, to the maximum extent practicable. Launches

must be limited during January through February and June through July, to the maximum extent practicable.

#### Proposed Monitoring Measures

The Navy must obtain visual, video and audio, and acoustic data from up to three pinniped haulout monitoring sites during each launch event, to the maximum extent practicable. The holder of this IHA is required to abide by the following marine mammal and acoustic monitoring requirements:

##### *Visual Monitoring*

Marine mammal monitoring must be conducted by qualified, trained protected species observers. The following visual monitoring measures will be conducted during preparations for video and acoustic monitoring, as described in *Video and Audio*

*Monitoring* section below: 1) Visual monitoring must be conducted before and after launches, including scanning the affected haulout beaches and counting the number and species of pinnipeds over a 15-30 minute period; 2) Prior to a launch event, Navy personnel must make observations of the monitored pinniped haulout and record the numbers and species of pinnipeds observed on field data sheets; and 3) After a launch event, Navy personnel must return to the monitored pinniped haulout and record the numbers and species of pinnipeds that remain on the haulout sites and any notable changes.

##### *Video and Audio Monitoring*

Before each launch, Navy personnel must set up or activate up to three video cameras (either high-definition video cameras, or Forward-Looking Infrared Radiometer (FLIR) thermal imaging cameras for night launch events) such that they overlook the

monitoring sites. Each camera will be set to record a focal group of pinnipeds within the haulout for the maximum recording time permitted by the camera capacity. Video and audio monitoring must be conducted by recording continuously from a minimum of two hours before the event to approximately one hour after the event in order to:

Determine the composition of the focal subgroup of pinnipeds (approximate numbers and sexes of each age class).

Describe the launch event, including documenting the occurrence of a launch event, the type of target/missile launched, the timing of the event, and duration of audibility.

Document movements of pinnipeds, including number and proportion moving, direction and distance moved, and pace of movement (slow or vigorous). In addition, the following variables concerning the circumstances of the observations must also be recorded from the videotape or from direct observations at the site:

1. Study location,
2. Local time,
3. Weather (including an estimate of wind strength and direction, and presence of precipitation), and
4. Tide state.

Identify and document any change in behavior or movements of pinnipeds that occurs at the time of the launch event.

Compare received levels of launch sound with pinniped responses, based on acoustic and behavioral data from up to three monitoring sites at different distances from

the launch site and missile path during each launch; from the data accumulated across a series of launches, to attempt to establish the “dose-response” relationship for launch sounds under different launch conditions if possible.

Ascertain periods or launch conditions when pinnipeds are most and least responsive to launch activities. Lastly, document take by harassment: 1) Pinnipeds that are exposed to launch sounds strong enough to cause a temporary threshold shift (TTS); or 2) Pinnipeds that leave the haulout site, or exhibit prolonged movement (greater than 10 m) or prolonged behavioral changes (such as pups separated from mothers) relative to their behavior immediately prior to the launch.

#### *Acoustic Monitoring*

The Navy must use up to four autonomous audio recorders to make acoustical measurements. During each launch, these must be located as close as practicable to pinniped haulout monitoring sites and near the launch pad itself. The monitored pinniped haulout sites must typically include one site as close as possible to the missile’s planned flight path and one or two locations farther from the flight path within the area of potential impact with pinnipeds present. Autonomous Terrestrial Acoustic Recorders must be deployed at the recording locations on the launch day well before the launch time, and must be retrieved later the same day. Acoustic measurements must be collected and reported consistent with section 13.2 of the Navy’s application.

#### *Reporting*

A draft report on all monitoring conducted under the IHA must be submitted within 90 calendar days of the completion of marine mammal and acoustic monitoring or 60 days prior to the issuance of any subsequent IHA or incidental take regulations for this

project, whichever comes first. A final report must be prepared and submitted within 30 days following resolution of comments on the draft report from NMFS. This report must contain the informational elements described in Section 5 of the Authorization.

*Reporting Injured or Dead Marine Mammals*

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this IHA, such as serious injury, or mortality, the Navy must immediately cease the specified activities and report the incident to the NMFS Office of Protected Resources (301-427-8401) and the West Coast Stranding Coordinator (562-980-3230). The report must include the following information:

1. Time and date of the incident;
2. Description of the incident;
3. Environmental conditions (*e.g.*, wind speed and direction, cloud cover, and visibility);
4. Description of all marine mammal observations and active sound source use in the 24 hours preceding the incident;
5. Species identification or description of the animal(s) involved;
6. Fate of the animal(s); and
7. Photographs or video footage of the animal(s).

Activities must not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with the Navy to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The Navy may not resume their activities until notified by NMFS.

In the event the Navy discovers an injured or dead marine mammal, and the lead observer determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.*, in less than a moderate state of decomposition), the Navy must immediately report the incident to the Office of Protected Resources, NMFS, and the West Coast Region Stranding Coordinator, NMFS. The report must include the same information identified in 6(b)(i) of this IHA. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with the Navy to determine whether additional mitigation measures or modifications to the activities are appropriate.

In the event that the Navy discovers an injured or dead large whale or other cetaceans, and the lead observer determines that the injury or death is not associated with or related to the specified activities (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the Navy must report the incident to the Office of Protected Resources, NMFS, and the West Coast Region Stranding Coordinator, NMFS, within 24 hours of the discovery.

This Authorization may be modified, suspended or withdrawn if the holder fails to abide by the conditions prescribed herein, or if NMFS determines the authorized taking is having more than a negligible impact on the species or stock of affected marine mammals.

### **Public Comments**

As noted previously, NMFS published a notice of a proposed IHA (84 FR 18809; May 2, 2019) and solicited public comments on both our proposal to issue the initial IHA for target and missile launch activities and on the potential for a Renewal IHA, should certain requirements be met.

All public comments were addressed in the notice announcing the issuance of the initial IHA (84 FR 28462; June 19, 2019). Below, we describe how we have addressed, with updated information where appropriate, any comments received that specifically pertain to the Renewal of the 2019 IHA.

*Comment:* The Marine Mammal Commission (the Commission) questioned whether the public notice provisions for IHA Renewals fully satisfy the public notice and comment provision in the MMPA and discussed the potential burden on reviewers of reviewing key documents and developing comments quickly. Additionally, the Commission recommended that NMFS use the IHA Renewal process sparingly and selectively for activities expected to have the lowest levels of impacts to marine mammals and that require less complex analysis.

*Response:* The Commission has submitted this comment multiple times, and NMFS has responded multiple times, including, for example, more recently in the notice of issuance of an IHA to Ørsted Wind Power LLC (84 FR 52464, October 2, 2019), and we refer the Commission to that response. We also include NMFS' original response to the comment received on the 2019 Chevron proposed IHA here:

NMFS has taken a number of steps to ensure the public has adequate notice, time, and information to be able to comment effectively on Renewal IHAs within the limitations of processing IHA applications efficiently. **Federal Register** notices for the proposed initial IHAs identified the conditions under which a one-year Renewal IHA might be appropriate. This information is presented in the Request for Public Comments section and thus encourages submission of comments on the potential of a one-year renewal as well as the initial IHA during the 30-day comment period. In

addition, when we receive an application for a Renewal IHA, we will publish notice of the proposed IHA Renewal in the **Federal Register** and provide an additional 15 days for public comment, making a total of 45 days of public comment. We also directly contact all commenters on the initial IHA by email, phone, or, if the commenter did not provide email or phone information, by postal service to provide them the opportunity to submit any additional comments on the proposed Renewal IHA. Where the commenter has already had the opportunity to review and comment on the potential for a Renewal in the initial proposed IHA for these activities, the abbreviated additional comment period is sufficient for consideration of the results of the preliminary monitoring report and new information (if any) from the past year.

NMFS also strives to ensure the public has access to key information needed to submit comments on a proposed IHA, whether an initial IHA or a Renewal IHA. The agency's web site includes information for all projects under consideration, including the application, references, and other supporting documents. Each **Federal Register** notice also includes contact information in the event a commenter has questions or cannot find the information they seek.

For more information, NMFS has published a description of the Renewal process on our website (available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals>).

### **Preliminary Determinations**

The proposed action of this Renewal IHA, target and missile launch activities, would be identical to the activities analyzed in the Initial IHA. Based on the analysis detailed in the Notice of the Initial IHA authorization of the likely effects of the specified

activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS found that the total marine mammal take from the activity will have a negligible impact on all affected marine mammal species or stocks.

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will affect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) the Navy's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and; (5) appropriate monitoring and reporting requirements are included.

### **Endangered Species Act**

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

## **Proposed Renewal IHA and Request for Public Comment**

As a result of these preliminary determinations, NMFS proposes to issue a Renewal IHA to the Navy for conducting target and missile launch activities on SNI, California from June 12, 2020 through June 11, 2021, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed and final initial IHA can be found at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. We request comment on our analyses, the proposed Renewal IHA, and any other aspect of this Notice. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: May 26, 2020.

**Donna S. Wieting,**

*Director, Office of Protected Resources,*

*National Marine Fisheries Service.*

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